



U.S. Department of Justice

*United States Attorney
Southern District of New York*

86 Chambers Street
New York, New York 10007

March 5, 2019

By ECF

The Honorable Lorna G. Schofield
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *PEN American v. Trump*, 18 Civ. 9433 (LGS)

Dear Judge Schofield:

This Office represents defendant President Donald J. Trump in this First Amendment action brought by plaintiff PEN American Center, Inc. (“PEN American”). The parties respectfully submit this joint letter and appended proposed case management plan pursuant to the Court’s January 30, 2019, Order. Dkt. No. 35. The initial pretrial conference in this matter is currently scheduled to be held at 11:00 AM on March 12, 2019. Dkt. No. 39.

I. Statement of the Case

Plaintiff PEN American, an association advocating on behalf of writers, alleges that defendant has taken or encouraged actions intended to chill speech critical of himself or his administration. Plaintiff’s amended complaint asserts three claims under the First Amendment—first, for alleged retaliation for critical reporting; second, for alleged retaliatory threats; and third, for an alleged violation of the right to receive information. *See Am. Compl.* ¶¶ 115–36, Dkt. No. 38. Plaintiff seeks declaratory and injunctive relief, namely a declaration that defendant’s allegedly retaliatory actions violated the First Amendment and an injunction forbidding defendant from directing any subordinate to take any action in retaliation for speech critical of defendant or his Administration. *See id.* Prayer for Relief.

Defendant will argue in his anticipated motion to dismiss that this Court should dismiss plaintiff’s complaint on jurisdictional grounds because plaintiff lacks standing and because this Court lacks jurisdiction to enter the requested relief against the President in this context. Defendant will also argue that plaintiff’s complaint fails to state a claim for relief under the First Amendment. At the motion-to-dismiss stage, the key legal issues will be whether plaintiffs have Article III standing, whether this Court has jurisdiction to enter plaintiff’s requested relief against the President, and whether plaintiff has alleged a plausible claim for relief. In the event defendant’s anticipated motion to dismiss is denied, the key issues will be whether the actions alleged by plaintiff were, in fact, retaliation for critical news reports, unlawful threats, or infringements on plaintiff’s ability to receive information, and whether those actions in this context violate the First Amendment.

II. Plaintiff's Statement of Jurisdiction

Plaintiff asserts that this Court has jurisdiction over its amended complaint pursuant to 28 U.S.C. § 1331 because Plaintiff's claims arise under the First Amendment to the United States Constitution. Plaintiff will argue that it has both organizational and associational standing to pursue its claims and that this Court has jurisdiction to grant the relief Plaintiff seeks.

III. Defendant's Statement of Jurisdiction

Defendant asserts that this Court lacks jurisdiction over plaintiff's complaint on constitutional grounds. As defendant will argue in his anticipated motion to dismiss, plaintiff lacks Article III standing to bring its claims. Defendant also maintains that this Court lacks jurisdiction to grant the requested relief against the President.

IV. Anticipated Motions

Defendant seeks to file a motion to dismiss plaintiff's complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant will argue that this Court lacks jurisdiction because plaintiff lacks organizational or associational standing under Article III. Defendant will also argue that this Court lacks jurisdiction to enter the requested relief against the President. In addition, defendant's motion will assert that plaintiff has failed to plausibly allege a claim for relief under the First Amendment, including because plaintiff has failed to allege that plaintiff's speech motivated defendant to take any action and because plaintiff has failed to allege any requisite injury for purposes of a First Amendment claim.

Plaintiff will respond, *inter alia*, that it has both organizational and associational standing under Article III because, among other reasons, plaintiff has plausibly alleged injuries in fact to both itself as an organization, its members, and those journalists on whose behalf plaintiff advocates. Plaintiff will further respond that this Court has jurisdiction to enter the relief plaintiff requests. Plaintiff will also respond that it has sufficiently alleged claims for relief under the First Amendment by plausibly alleging that defendant's illegal actions were motivated by the content of plaintiff's members speech and that of third parties on whose behalf plaintiff advocates.

Defendant also seeks to file a motion to stay discovery pending the outcome of its anticipated motion to dismiss. As discussed herein, defendant's motion to dismiss will present substantial legal arguments for dismissal, warranting a stay of discovery. In addition, plaintiff's claims against the President—and the possibility of taking discovery against the President—amount to extraordinary circumstances warranting a stay of discovery. While Plaintiff does not concede that defendant's legal arguments warrant dismissal, Plaintiff has informed defendant that plaintiff will not oppose defendant's motion to stay discovery, unless this Court deems jurisdictional discovery necessary and appropriate.

V. Discovery

No discovery has taken place. Defendant seeks to file a motion to stay discovery pending the outcome of defendant's anticipated motion to dismiss. The parties anticipate that the scope of

admissible, material discovery will substantially depend on the extent of executive privilege in this context.

VI. Damages

Plaintiff is not seeking damages in this action.

VII. Settlement Discussions

The parties have not engaged in settlement discussions and do not think a settlement conference would be useful at this time.

VIII. Other Information

The parties do not have further information to offer the Court at this time. Counsel for the parties have worked cooperatively, in preparing this letter and with regard to defendant's anticipated motions.

The parties and their counsel thank the Court for its consideration of this submission.

Respectfully submitted,

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Encl.